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RECENT AMERICAN DECISIONS.

*Supreme Court of Louisiana.*CITY OF NEW ORLEANS *v.* THE GREAT SOUTHERN TELEPHONE AND TELEGRAPH CO.

An annual charge of five dollars per pole, upon the poles of a telephone company already established, imposed by a municipal ordinance as a "consideration for the privilege," is not a tax, either on property or as a license, and cannot be sustained as an exercise of the taxing power.

Such annual charge is not an exercise of the police power, as it involves no consideration of public order, health, morals, or convenience.

A municipal ordinance, granting to a particular company authority to construct and maintain telephone lines on the streets, without any limitation as to time, and for a consideration stipulated, when accepted and acted on by the grantee complying with all the conditions of the ordinance and constructing a valuable and expensive plant, acquires thereby the features of a contract, which the city cannot thereafter abolish or alter in its essential terms, without the consent of the grantee. The imposition of new and burdensome conditions is a violation thereof.

A proviso in such ordinance, that "the acts and doings of the company under this ordinance shall be subject to any ordinance or ordinances hereafter passed by the city," does not convert the grant into a mere revocable permit. It assumes that the ordinance is to continue in full force and effect, and recognizes the right of the grantee to do and to act under and in accordance with it, and only subjects "such acts and doings" to future municipal regulations, not inconsistent with the ordinance itself.

APPEAL from the Civil District Court, Parish of Orleans.

Suit by the City of New Orleans, plaintiff and appellant, against The Great Southern Telephone and Telegraph Company, defendant and appellee, to compel payment of a tax of five dollars per pole, put up by the company.

Walter H. Rogers, City Attorney, and *Branch K. Miller*, Ass't City Attorney, for appellant.

Bayne, Denegre & Bayne, for appellee.

FENNER, J. (February 13, 1888).—The defendant is the assignee and successor of The New Orleans Telephonic Exchange, referred to in the following ordinance of the City of New Orleans, adopted February 18, 1879 :

"An Ordinance authorizing the construction and maintenance of a telephonic telegraph line through the streets of the City of New Orleans.

"SECTION 1.—*Be it ordained* by the City Council of the City of New Orleans, that the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city; the lines or line to be constructed along such streets, at such points, and in such manner, as to the kind and position of telegraph poles, the height of the wires above the streets, and in all other particulars, as the administrator of the department of improvements may direct; *provided*, however, that the said company shall connect their wires with the mayor's office, chief of police's office, and fire-alarm telegraph office, and place and keep telephones therein, free of charge to the city, so that said telephones may be used in connection with all wires under the control of said company.

"SEC. 2. *And be it further ordained*," etc., "that all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning same."

Under this ordinance defendant constructed, and has since maintained, telephonic lines through the streets, built according to the directions of the administrator of improvements, and with his approval, and has furnished the city with the free telephonic service stipulated, and has complied in all respects with the terms of the ordinance. The plant established by defendant is expensive and valuable. The defendant pays a tax upon this plant as property, and also pays a license tax levied on its business. In April, 1880, the general assembly of the State passed act, No. 124, authorizing corporations formed for the purpose of transmitting intelligence by magnetic telegraph or telephone, to "construct and maintain telegraph, telephone, and other lines along all State, parish, or public roads or public works, and along and parallel to any of the railroads in the State, and over the waters of the State, *provided* that the ordinary use of such roads, works, railroads, and waters be not thereby obstructed, *and along the streets of any city, with the consent of the council or trustees thereof.*" The defendant having the prior consent of the city, certainly came under the protection of this act as to the maintenance of its lines, from the date of its passage. In December, 1883, the city council passed "An

Ordinance to regulate and control the erection and maintenance of poles for supporting wires of the telephones within and on the streets, ways, and public places of the City of New Orleans," containing various provisions on the general subject, with none of which we have any present concern, except the following: that "no poles shall be allowed to be erected, *or any existing poles be allowed to remain*, in that portion of the city embraced by Jackson street, Elysian Fields, Roman street, and the Mississippi river, *except on the payment of five dollars per annum, per pole, for every such pole erected or at present in use*, within that section of the city; * * * * * said payments to be *in consideration of the privilege and advantage of entering upon, using and permanently occupying the streets, ways and places of the city for private property*, and to be paid annually in advance, commencing January 1, 1884." Defendant had six hundred poles within the section designated, on which the sum of \$3,000 is claimed to be due, and the object of the present action is to enjoin defendant from using or maintaining said poles for telephonic purposes, until payment thereof be made. It is not pretended that the exaction claimed is a tax, either on property or as a license, or that it is an exercise of the taxing powers, in any respect. The ordinance qualifies it as a price or consideration for the privileges enjoyed. It is not even alleged that defendant has ever consented or contracted to pay such consideration, and the attempt made to prove such consent was not only *ultra petitionem*, but the evidence offered for the purpose was manifestly insufficient and illegal, and was properly rejected. There is, therefore, entire absence of any legal tie binding the defendant as a debtor for the amount claimed, and, if the city were suing simply for a money judgment, the petition would set forth no cause of action. The real relief claimed by the city, however, is found in the injunction prayed for, based on the theory that the provision of the ordinance referred to, is a regulation or condition, imposed upon the maintenance of the poles and exercise of the privileges which the city had the right to impose, and without compliance with which the defendant could not lawfully continue to maintain and exercise them.

The question for our determination is whether the city had the right to make such a regulation or impose such condition.

It is not seriously contended that the provision is a police regulation; and, indeed, such contention is silenced, not only by the nature, but by the express terms of the provision itself, which qualify the exaction as a "consideration for the privilege." No consideration whatever of public morals, health, or convenience is involved. It is not proposed to abolish the use of poles or to alter their location, construction, or use, in any way, to subserve the public comfort. The simple requirement is the payment of a price, on payment of which the *status quo* continues; while without such payment, it must cease. The case presents no feature of an exercise of the police power.

The only remaining question is whether, after granting the defendant authority to construct and to maintain its lines, without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city, after the defendant has, at great expense, established its plant and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted. If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can, with equal power, impose one of one thousand dollars, and, for that matter, she could arbitrarily revoke the grant at her pleasure. Either she is bound, according to the terms of her proposition accepted and acted on by the defendant, or she is not bound at all. Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new or more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518.

The main contention of the city, however, is that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows: "That all the *acts and doings* of said company *under* this ordinance, shall be subject to

any ordinance or ordinances that may hereafter be passed by the city council concerning the same." The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter. It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the term and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If any such unreasonable intention lurked in the minds of the council which passed the ordinance, the grantor under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously. But what is it that is subject to regulation and control by future ordinances? It is "*the acts and doings of said company under this ordinance.*" This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy, or alter it in any of its essential features and considerations. It recognizes the right of the company to act and to do under and according to the ordinance, only subjecting such "acts and doings" to municipal regulations, not conflicting with the ordinance itself. We consider that the imposition of the additional and burdensome consideration here involved, is not within the scope of the right reserved.

Judgment affirmed.

License of Telegraph Companies.—In the recent case of *West. Un. Tel. Co. v. Philadelphia and Mut. Un. Tel. Co. v. Same*, S. Ct. Penna., January 23, 1888, the facts were similar to those in the principal case, but the court ruled differently as to the law. The city of Philadelphia had passed ordinances providing that "no pole shall be duly erected without the license of the superintendent of the police and fire alarm telegraph shall have been previously obtained therefor, as provided in this section; and for every license so granted there shall be paid to the city treasurer, for the use of the city, the sum of five dollars per pole;" that "it shall be the duty of the owners of tele-

graph poles, whether corporations or individuals, to make application to the said superintendent for a license to maintain poles for the ensuing year, said application to be made on the first Monday of January in every year, and that the charge for issuing such a license shall be one dollar for each and every pole authorized to be maintained, which shall be paid to the city treasurer, for the use of the city;" that "on all conductors or wire suspended above ground, except such as are used or owned by the city of Philadelphia, an annual payment of \$2.50 per mile, or part thereof, in length, of wires or conductors, shall be paid for each and every wire or conductor used, or to be used, for tele-

graphic, telephone, or other purposes;" and that "failure to make payment as required thereby shall subject the offender to the penalty of fifty dollars per day for each and every day thereafter until payment is made." The actions were brought by the city, for the amount of the license fees due under these ordinances. They were heard before a referee, who reported: *First*, that the charge sought to be recovered by the city could not be maintained as a tax, because it is not within the power of taxation which has been delegated to the city by the State; and, *second*, that the charges are unreasonable as license fees, and operate in substance as a tax, and that the ordinances were therefore void. Then the cases were sent again to the referee, to report on the following questions: Whether the city had authority to allow or prohibit telegraph poles or wires, through the streets of the city, which was answered negatively; whether it could exact a fee or payment as a condition for their erection or continuance; and whether the ordinances in controversy, were a valid exercise of authority; these two questions were answered, that the payment sought to be exacted was unreasonable. But the court held otherwise, after a lengthy review of the multiplicity of uses, claiming either the soil or the air of the city highways.

"It is an established principle that remuneration should be in proportion, not only to time and outlay, but to responsibility, and a public or private agent who is exposed to loss may demand higher pay. That such is the relation of the city to the various companies which have been empowered to occupy its streets with a view to gain, is to me abundantly clear, and they should not grudge a reason-

able compensation for the space they occupy, and the risk which she incurs on their account. That the rate cannot readily be determined is no doubt true, but this circumstance affords an argument for the city, because there is a presumption in favor of the acts of public bodies within the scope of their powers. The question is not, would we name \$5 a reasonable fee? but, is it so plainly in excess as to render it our duty to reverse the decision of councils? On this point, as I have already intimated, we are of opinion with the city, and therefore sustain the exceptions which she has filed, and send the case back to the referee for reconsideration on the above point."

On error, this decision was affirmed, the Supreme Court holding that the companies were properly subjected to a reasonable license fee; that it was not an open question, and concurring with the conclusion of the court below, that the fee charged was not so obviously excessive and unjust as to authorize a revision of the action of the City Councils.

This decision appears more consonant with reason and justice than that in the principal case. And there is, besides, a considerable weight of authority supporting the opinion of the Pennsylvania court. See as to the power of municipalities to charge license fees to railway, telegraph, and other public institutions: *State v. Herod*, 29 Iowa, 123; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149; *Frankford, etc., R. Co. v. Philadelphia*, 58 Penna. St. 119; *Johnson v. Philadelphia*, 60 Id. 445; *Mayor of New York v. Second Ave. R. Co.*, 32 N. Y. 261; *Allerton v. City of Chicago*, 20 Am. L. Reg. (N. S.) 473; and concerning the amount of the license fees, examine *Chilvers v. People*, 11 Mich. 43; *State v. Cassaday*, 22 Minn. 312; *Tenney v.*

Lenz, 16 Wis. 566; *Carter v. Dow*, 16 Id. 299; *Johnson v. Philadelphia*, 60 Penna. St. 445, 450; *Cincinnati v. Bryson*, 15 Ohio, 625 (\$3 dray license); *Cincinnati v. Buckingham*, 10 Id. 257 (25 cents market fee); *Kip v. Pater-son*, 26 N. J. L. 298; *Ash v. People*, 11 Mich. 347 (\$5 market license); *Boston v. Schaeffer*, 9 Pick. 415 (\$1,000 theatrical license); *Kitson v. Ann Ar-bor*, 26 Mich. 325; *Baker v. Cincin-nati*, 11 Ohio St. 534 (\$63.50 theatri-cal license); *Van Baalen v. People*, 40 Mich. 258 (\$200 pawnbrokers' license); *Chicago Packing Co. v. Chi-cago*, 88 Ill. 221 (\$100 packing house license); *St. Paul v. Colter*, 12 Minn. 41; *Mayor v. Yuille*, 3 Ala. 137 (\$20 baker license); *Mays v. Cincinnati*, 1 Ohio St. 263 (\$95 for huckster license and \$5 for issuance).

Conditions and regulations as to erec-tion of poles.—It is undoubtedly com-petent for a municipality to couple with permission to use its streets for telegraph purposes, such reasonable conditions as the occupancy of a pub-lic street by posts and wires would suggest, and without such conditions, the erection and maintenance of ap-pliances of the business of the com-pany would be subject to the reason-able control of the municipal by-laws: *Dill. Mun. Corp.*, §§ 555, 558, 575. The same remark is true as to regula-tion by the legislature. A bond may be required of the company to fill up and repave excavations in the streets, and to indemnify the municipality for losses caused by its negligence. Com-pensation in the shape of license fees or otherwise may be exacted. The size, number, shape, material, loca-tion, and painting of poles, may be regulated.

The right to erect telegraph poles in the streets of a city does not carry with it the right to erect broken and unsightly poles: *Forsythe v. B. & O.*

Tel. Co., 12 Mo. App. 494. The muni-cipality may regulate the route and elevation of the wires: *Am. Un. Tel. Co. v. Harrison*, 31 N. J. Eq. 627. See also *Philadelphia v. W. U. Tel. Co.*, 11 Phila. 327. Until regula-tions are adopted, the municipal au-thorities are not at liberty to treat poles in the streets as a nuisance, sub-ject to abatement by destruction by the municipal authorities: *Am. Un. Tel. Co. v. Harrison*, 31 N. J. Eq. 627. As to whether telegraph poles and wires are nuisances, see also 2 *Dill. Mun. Corp.*, § 698; *Lackland v. R. R. Co.*, 31 Mo. 180; *Porter v. R. R. Co.*, 33 Id. 128; *Atlantic, etc., R. R. Co. v. St. Louis*, 66 Id. 228; *Randle v. R. R. Co.*, 65 Id. 325.

It would seem, however, from *Wandsworth Board of Works v. United Tel. Co.*, L. R. 13 Q. B. Div. 904, that a telephone or telegraph company could string its wires so high across a street as to be beyond the jurisdic-tion of the municipal authorities, such jurisdiction being confined to the surface of the street and such dis-tance above and below it as is ordi-narily used for public traffic. This case follows *Coverdale v. Charlton*, 4 Q. B. Div. 104, but it is governed by a statute and would probably be of no great weight as an authority in Ameri-can courts.

In England, by statute, power is conferred upon the railway commis-sioners to decide upon the position and composition of telegraph wires and poles, in case the municipality and the telegraph authorities cannot agree. In *Wandsworth Local Board v. Postmaster Gen'l*, 4 Ry. & Can. Traf-fic Cases, 301 (Browne & Mac), the Local Board wanted underground wires. The railway commissioners decided that overhead wires should be allowed subject to the following con-ditions: 1. That all wires should be

of copper. 2. That all poles should be of iron. 3. That no wire should be placed over, along, or across any road or footway at a less height than thirty feet above such road or footway. 4. That where a wire crosses over any public road or street, the distance between the points of support at either side of the road or street should not in any case exceed 100 yards.

Liability for injuring telegraph lines, cables, poles, or instruments.—The uninterrupted and unimpeded use of lines and instruments of communication is so important to the public that, besides the ordinary liability of all persons to answer a civil action for damages for a completed injury to any telegraphic apparatus or to be restrained by injunction from doing an apprehended injury to such apparatus, there are criminal enactments upon the subject. Thus, in England, by statute, 24 & 25 Vict. c. 97, § 37, it is provided that whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever, the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor; *provided*, that if it shall appear to any justice, on the examination of any person charged with any offense against this section that it is not expedient to the ends of justice that the same should be prosecuted by indictment,

the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common jail or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding £10, as to the justice shall seem meet.

By section 38, whosoever shall unlawfully and maliciously by any overt act, attempt to commit any of the offenses in the last preceding section mentioned, shall, on conviction thereof, before a justice of the peace, at the discretion of the justice, either be committed to the common jail, or house of correction, there to be imprisoned or to be imprisoned and kept to hard labor, for any term not exceeding three months, or else shall forfeit and pay such sum of money, not exceeding £10, as to the justice shall seem meet.

Two civil cases wherein damages were sought for injury to telegraph lines have come to the writer's notice. Both were injuries to submarine cables. In one, the plaintiffs were the owners of a cable lying at the bottom of the sea between England and France. The defendants were aliens and their ships, while sailing upon the high seas more than three miles from the English coast, lowered an anchor and injured the cable. *Held*, that the court would presume that the masters of the ships were aware of the existence and situation of submarine cables, and that a duty was thereupon cast on all such masters of ships to manage their vessels so carefully and skillfully as to avoid (if possible, in the exercise of reasonable precaution) injuring these cables: *Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759; 10 Jur.

N. S. 211; 33 L. J. C. P. 139; 12 W. R. 384; 10 L. T. N. S. 32.

The other case was that of the "Clara Killam," which let go an anchor to keep from going ashore. The anchor caught in a cable and it was cut in order to get clear. Subsequently the vessel was sued for the damage done. The court thought the case so novel that it needed time to consider, and went off to talk to "the elder brethren of the Trinity House" about it. They advised that by ordinary nautical skill, the damage to the wire might have been avoided, and that if a slip rope had been passed under the telegraph cable and hove taut, the anchor might have been easily cleared, the slip rope then let go, and the cable dropped in its place. *Held*, that the "Clara Killam" was "to blame for the injury done to the wire, and she was condemned in damages and costs." *The Clara Killam*, 39 L. J. Adm. 50.

Criminal prosecution of telegraph companies for obstructing streets.—Telegraph companies themselves may be prosecuted criminally for obstructing the highway. This was decided in *Reg v. United Kingdom Tel. Co.*, 31 L. J. M. C. 166; 2 B. & S. 647 n.; 9 Cox Cr. Cas. 174. Where an ordinary highway runs between fences, one on each side, the right of passage of the

public covers the entire space between the fences. An unauthorized obstruction upon it is an indictable nuisance at common law. In the case last cited, it was held that the company were liable to conviction, even though its posts were placed upon the hard or metalled part of the highway, or on an artificial footpath upon it, or even though enough space for the public traffic was left. The case is in line with the many authorities, sanctioning the indictment of corporations for obstructing highways: See *Cin. South. R. R. v. Commonwealth*, 80 Ky. 137; 7 Am. & Eng. R. R. Cas. 91; *L. & N. R. R. Co. v. State*, 3 Head (Tenn.) 524; *Pittsburgh V. & C. R. Co. v. Commonwealth*, 10 Am. & Eng. R. R. Cas. 321; and see generally, "Indictment of Corporations," 6 Crim. Law Mag. 317.

A telephone company is not entitled to a preliminary injunction to restrain the authorities of a town from removing poles for telephone wires, when the claim on which the right is founded is, as a matter of law, unsettled: *New York, etc., Tel. Co. v. East Orange*, 42 N. J. Eq. 490. See, also, *Citizens' Coach Co. v. Camden H. R. Co.*, 29 Id. 299; *Atty. Gen'l v. United Kingdom, etc., Tel. Co.*, 30 Beav. 287.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Indiana.

VANVACTOR v. STATE.

A school teacher may inflict reasonable punishment upon a pupil for insubordination. Where such punishment is administered with a two-pronged switch, in nine sharp blows, which does not cause the pupil to make an outcry, and which produces no serious injury, although the punishment was painful and caused some abrasion of the skin, and where it is not shown that it was maliciously inflicted, the teacher is not guilty of an assault and battery.

APPEAL from Circuit Court of Marshall county.